No. 85-1887 (8)

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

GERALDINE FENNELL,
on behalf of herself and all others similarly situated,
Petitioner,

—against—

WARNER-LAMBERT COMPANY,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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BRIEF FOR RESPONDENT IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Did the District Court commit an abuse of its discretion in refusing, on grounds of "mistake of substance," to set aside, under Rule 60(b)(1) of the Federal Rules of Civil Procedure, its prior judgment of dismissal in this case for lack of prosecution and in denying Petitioner's subsequent motions for reconsideration, an evidentiary hearing, and further clarification and reconsideration; where:

(a) the action had been commenced in June 1977 and was based upon events which are alleged to have occurred between 1971 and 1974; and

(b) the action had been dismissed in May 1983 for lack of prosecution under Rule 41(b) of the Federal Rules of Civil Procedure and Rule 16(a) of the Rules of Civil Procedure for the United States District Court for the District of Connecticut, the dismissal had been affirmed by the Second Circuit in 1983, and certiorari had been denied by this Court in 1984; and

(c) Petitioner's failure to prosecute the action for many years was the result of a running dispute with her counsel, whom she adamantly refused either to discharge, permit to withdraw, or proceed with the case; and

(d) all matters raised in the Rule 60(b)(1) motion could have been raised on Petitioner's appeal from the 1983 dismissal and had, in fact, been so raised?

RULE 28.1 STATEMENT

Respondent Warner-Lambert Company ("Warner-Lambert") has no parent corporations. The common stock of Warner-Lambert is publicly traded on the New York Stock Exchange.

The following is a list of the subsidiaries of Warner-Lambert, as set forth in Exhibit 22 to the Form 10-K filed by Warner-Lambert with the Securities and Exchange Commission, showing the state or country of incorporation and the percentage of voting securities owned by Warner-Lambert or by subsidiaries of Warner-Lambert as of December 31, 1985.

"Name of Corporation	State or Country of Organization		Percentage of Ownership
dams, S.A.	Spain	100	
dams Portugal Comercio e Industria Limitada	Portugal	90	
		10	Chicle Adams, Inc.
hmex, S.A. de C.V.	Mexico	100	
Chicle Adams, S.A. de C.V.	Mexico	100	Ahmex, S.A. de C.V.
Compania Medicinal La Campana, S.A. de C.V.	Mexico	100	Ahmex, S.A. de C.V.
merican Chicle Company	Delaware	100	
merican Food Industries, Inc.	Delaware	100	
Clark Gum Company Morocco	Morocco	100	American Food Industries, Inc.
.A. Lady	Venezuela	100	
Chicle Adams, S.A.	Venezuela	90	C.A. Lady
		10	Chicle Adams, Inc.
hicle Adams, Inc.	New York	100	
irsa, S.A.	Venezuela	100	
Velarca, S.A.	Venezuela	80	Cirsa, S.A.
lark Gum Company N.V.	Belgium	100	

Name of Corporation	State or Country of Organization		Percentage of Ownership
Compania de Chicle Adams, Inc.	New York	100	
Chicle Adams del Uruguay S.A.	Uruguay	100	Compania de Chicle Adams, Inc.
Parke Davis & Cia. de Argentina S.A.I.C.	Argentina	100	Compania de Chicle Adams, Inc.
Warner-Lambert Argentina, S.A.	Argentina	81.5	Compania de Chicle Adams, Inc.
		18.5	Warner Lambert Company AG
Distribuidora Mercantil Centro Americana, S.A.	Delaware	100	
Dismercasa de Costa Rica, Sociedad Anonima	Costa Rica	100	Distribuidora Mercantil Centro Americana, S.A.
Empresas Warner Lambert S.A.	Chile	70.6	
		29.4	Parke-Davis
Euronett, Inc.	Delaware	100	
Exchic, C.A.	Venezuela	100	
Family Products Corp.	New York	100	
Laboratorios Laprofa, Sociedad Anonima	Guatemala	100	Family Products Corp.
Laboratorios Warner Ltda.	Brazil	100	Family Products Corp.
FIRAP, N.V.	Belgium	100	
IMED Corporation	Delaware	100	
IMED Ireland Limited	Ireland	100	
Internacional Participacoes Ltda.	Brazil	100	
Warner-Lambert Industria e Comercio Ltda.	Brazil	100	Internacional Participacoes Ltda.

Name of Corporation	State or Country of Organization		Percentage of Ownership
Chadams Participacoes e Comercio Ltda.	Brazil	100	Warner-Lambert Industria e Comercio Ltda.
nternational Affiliated Corporation	Delaware	100	
Goedecke Aktiengesellschaft .	Germany	87.96	International Affiliated Corporation
		11.64	
Adenylchemie G.m.b.H. ...	Germany	100	Goedecke Aktiengesellschaft
Goedecke Gesellschaft m.b.H.....	Austria	100	Goedecke Aktiengesellschaft
International Company for Gum and Confectionery (Incogum) S.A.E.	Egypt	57	Goedecke Aktiengesellschaft
Panserv-Anzeigen-Service G.m.b.H.	Germany	100	Goedecke Aktiengesellschaft
Parke Davis Afrique de l'Ouest	Senegal	100	Goedecke Aktiengesellschaft
W. R. Warner & Co. G.m.b.H.	Germany	100	Goedecke Aktiengesellschaft
Goedecke Beteiligungs-und Vertriebs G.m.b.H.	Germany	100	International Affiliated Corporation
Goedecke Vertriebs G.m.b.H. & Co.	Germany	75	Goedecke Beteiligungs- und Vertriebs G.m.b.H.
		25	Adenylchemie G.m.b.H.
arke-Davis Sendirian Berhad	Malaysia	100	International Affiliated Corporation

Name of Corporation	State or Country of Organization		Percentage of Ownership
Keystone Chemurgic Corp.	Delaware	100	
Chicle Adams C.A. Limited .	Bermuda	100	Keystone Chemurgic Corp.
Productos Adams, S.A.	Guatemala	100	Keystone Chemurgic Corp.
Laboratorios Substantia, C.A...	Venezuela	80	
Lambert & Feasley, Inc.	New York	100	
Lambert Pharmacal Company (N.Z.) Limited	New Zealand	100	
*Meito Adams Co., Ltd.	Japan	50	
Parfums Ciro, Inc.	Delaware	100	
Parke, Davis & Company ("Parke-Davis")	Michigan	100	
R. Jung G.m.b.H.	Germany	100	Parke-Davis
P-D Co., Inc.	Delaware	100	Parke-Davis
Davpar Company	Switzerland	100	P-D Co., Inc.
Capsugel AG	Switzerland	100	Davpar Company
S.A. Capsugel N.V. ..	Belgium	100	Davpar Company
Hidracina Y Derivados, S.A.	Spain	100	Davpar Company
Laboratorios Parke Davis, S.A.E.	Spain	100	Davpar Company
N.V. Parke, Davis & Cie., S.A.	Belgium	100	Davpar Company
Quimica Sintetica, S.A.	Spain	100	Davpar Company
Societe Financiere et Commerciale de Cadillac	France	100	Davpar Company
Parke-Davis (Thailand) Limited	Thailand	100	P-D Co., Inc.

* Subsidiary not consolidated.

Name of Corporation	State or Country of Organization		Percentage of Ownership
rke, Davis & Company, Inc.	Philippines	100	Parke-Davis
rke, Davis & Company, Limited	Pakistan	75	Parke-Davis
rke Davis Inter-American Corporation	Delaware	100	Parke-Davis
Compania Farmaceutica Parke-Davis S.A.	Guatemala	100	Parke-Davis Inter-American Corporation
rke Davis International Limited	Bahamas	100	Parke-Davis
rke Davis Pty. Limited	Australia	100	Parke-Davis
Warner-Lambert Pty. Limited	Australia	100	Parke Davis Pty. Limited
Warner-Lambert (Services) Pty. Ltd.	Australia	100	Parke Davis Pty. Limited
rke Davis de Venezuela, C.A.	Venezuela	100	Parke-Davis
arner-Lambert K.K.	Japan	100	Parke-Davis
Capsugel Asian Marketing K.K.	Japan	100	Warner-Lambert K.K.
Parke, Davis K.K.	Japan	100	Warner-Lambert K.K.
e-Davis Sales Corporation	Virgin Islands	100	
e-Davis S.p.A.	Italy	98.50	
		1.50	Parke-Davis
ard Hudnut Limited	New Zealand	100	
hilab (Realty) Limited	New Zealand	50	Richard Hudnut Limited
		50	Warner-Lambert (NZ) Limited
arner-Chilcott (Mfg) Limited	New Zealand	50	Richard Hudnut Limited
		50	Warner-Lambert (NZ) Limited
ard Hudnut, S.A.	Spain	100	
k Interamericana, S.A.	Venezuela	100	

Name of Corporation	State or Country of Organization		Percentage of Ownership
Servicos Tecnicos e Comercio Sertico Ltda	Brazil	100	
Protequim Produtos Tecno-Quimicos Ltda	Brazil	100	Servicos Tecnicos e Comercio Sertico Ltda.
Societe Civile de Recherches Techniques S.A.R.L.	France	100	
Substantia	France	90	
		10	Parfums Ciro, Inc.
Parke-Davis	France	100	Substantia
Substantia Gesellschaft m.b.H.	Austria	100	
Tabor Corporation	Delaware	100	
TetraWerke Dr. rer. nat. Ulrich Baensch G.m.b.H.	Germany	100	(Indirect)
Biorell G.m.b.H.	Germany	100	TetraWerke Dr. rer. nat. Ulrich Baensch G.m.b.H.
HILENA Biologische und Chemische Erzeugnisse G.m.b.H.	Germany	100	Biorell G.m.b.H.
West-Aquarium G.m.b.H.	Germany	100	TetraWerke Dr. rer. nat. Ulrich Baensch G.m.b.H.
West-Aquarium G.m.b.H. & Co. KG	Germany	96.5	TetraWerke Dr. rer. nat. Ulrich Baensch G.m.b.H.
		3.5	West-Aquarium G.m.b.H.
Zoomedica Frickhinger G.m.b.H.	Germany	100	TetraWerke Dr. rer. nat. Ulrich Baensch G.m.b.H.
Warner-Chilcott Inc.	Delaware	100	
Warner-Lambert Canada Inc.	Canada	100	
Adams Brands Inc.	Canada	100	Warner-Lambert Canada Inc.

Name of Corporation	State or Country of Organization		Percentage of Ownership
Deseret Canada Inc.	Canada	100	Warner-Lambert Canada Inc.
Eversharp Canada Inc.	Canada	100	Warner-Lambert Canada Inc.
Parke-Davis Canada Inc.	Canada	100	Warner-Lambert Canada Inc.
arner-Lambert Company AG	Switzerland	100	
Adams (Thailand) Limited	Thailand	100	Warner-Lambert Company AG
Laboratorio Substancia/ Parke-Davis, S.A.	Spain	75	Warner-Lambert Company AG
		25	
Warner-Lambert (East Africa) Limited	Kenya	100	Warner-Lambert Company AG
Warner-Lambert Export Limited	Ireland	100	Warner-Lambert Company AG
arner-Lambert Espana, S.A.	Spain	100	
arner-Lambert France Ltd.	Delaware	100	
arner-Lambert Gesellschaft m.b.H.	Austria	100	
arner-Lambert Holland B.V.	Netherlands	100	
B.V. Substantia	Netherlands	100	Warner-Lambert Holland B.V.
Substantia—Produtos Farmaceuticos, Limitada	Portugal	95.5	B.V. Substantia
		.5	Substantia
Schick Nederland B.V.	Netherlands	100	Warner-Lambert Holland B.V.
J.P. Distributie N.V.	Belgium	100	Schick Nederland B.V.
arner-Lambert Inc.	Nevada	100	
arner-Lambert International Company	Delaware	100	
arner-Lambert International N.V.	Netherlands Antilles	100	

Name of Corporation	State or Country of Organization	Percentage of Ownership	
Warner-Lambert Ltd.	Delaware	100	
Warner-Lambert de Panama, Sociedad Anonima	Panama	100	Warner-Lambert Ltd.
Warner-Lambert Manufacturing (Ireland) Ltd.	Cayman Islands, British West Indies	100	
Warner-Lambert (NZ) Limited	New Zealand	100	
Warner-Lambert Philippines, Inc.	Philippines	56.1	
		43.9	Parke-Davis
Warner-Lambert S.A. (Proprietary) Limited	South Africa	100	
Warner-Lambert Scandinavia Aktiebolag	Sweden	100	
Warner-Lambert Sweden Aktiebolag	Sweden	100	Warner-Lambert Scandinavia Aktiebolag
Warner-Lambert (Schweiz) AG	Switzerland	100	
Warner-Lambert Technologies, Inc.	Texas	100	
Warner Lambert Holding Gesellschaft m.b.H.	Austria	100	Warner-Lambert Technologies, Inc.
C. Reichert Optische Werke AG	Austria	99.95	Warner-Lambert Holding Gesellschaft m.b.H.
C. Reichert Handelsgesellschaft m.b.H.	Austria	100	C. Reichert Optische Werke AG
Reichert-Jung	France	100	C. Reichert Optische Werke AG
W-L Technologies (Japan) Inc.	Japan	100	Warner-Lambert Technologies, Inc.
Warner-Lambert Technologies (Asia) Ltd.	Delaware	100	Warner-Lambert Technologies, Inc.

Name of Corporation	State or Country of Organization		Percentage of Ownership
arner-Lambert (U.K.) Limited	Delaware	100	
Reichert-Jung Limited	United Kingdom	100	Warner-Lambert (U.K.) Limited
Warner-Lambert Health Technologies Limited	United Kingdom	100	Warner-Lambert (U.K.) Limited
IMED Management Services Limited	United Kingdom	100	Warner-Lambert (U.K.) Limited
Parke Davis & Co. Limited	Jersey, Channel Islands	100	Warner-Lambert (U.K.) Limited
William R. Warner & Co., Limited	United Kingdom	100	Warner-Lambert (U.K.) Limited
Adams Brands Sales, Limited	United Kingdom	100	William R. Warner & Co., Limited
Chilcott Laboratories, Limited	United Kingdom	100	William R. Warner & Co., Limited
Hall Brothers (Whitefield) Limited	United Kingdom	100	William R. Warner & Co., Limited
Richard Hudnut Limited	United Kingdom	100	William R. Warner & Co., Limited
Lambert Chemical Company, Limited	United Kingdom	100	William R. Warner & Co., Limited
TetraMin (U.K.) Limited	United Kingdom	100	William R. Warner & Co., Limited

The foregoing list omits 10 domestic subsidiaries and 57 foreign subsidiaries which nsidered in the aggregate would not constitute a significant subsidiary."

The only changes that have occurred since December 31, 1985 are as follows:

(a) Ahmex, S.A. de C.V. has changed its name to Warner-Lambert de Mexico, S.A. de C.V.

(b) Lambert Pharmacal Company (N.Z.) Limited has transferred its shares to Warner-Lambert (NZ) Limited, a wholly owned subsidiary of Warner-Lambert Company.

(c) R. Jung G.m.b.H. was sold to a third party subsequent to December 31, 1985.

(d) Parke, Davis K.K. is subject to a pending sale to a third party.

(e) Servicos Tecnicos e Comercio Sertico Ltda. and Protequim Produtos Tecno-Quimicos Ltda. have been sold to a third party subsequent to December 31, 1985.

(f) Although still owned by Warner-Lambert Company, Deseret Canada Inc. will have its name changed by July 30, 1986.

(g) Warner Lambert Holding Gesellschaft m.b.H., C. Reichert Optische Werke AG, C. Reichert Handelsgesellschaft m.b.H., Reichert-Jung, W-L Technologies (Japan) Inc., Warner-Lambert Technologies (Asia) Ltd. and Reichert-Jung Limited have been sold to a third party subsequent to December 31, 1985.

(h) Warner-Lambert Health Technologies Limited and IMED Management Services Limited are subject to a pending sale to a third party.

(i) IMED Corporation and IMED Ireland Limited are subject to a pending sale to a third party.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED FOR REVIEW	i
RULE 28.1 STATEMENT	ii
TABLE OF CONTENTS	xii
TABLE OF AUTHORITIES	xiii
RULES INVOLVED	2
STATEMENT OF THE CASE	3
ARGUMENT	8
I. No reason exists for granting the writ of certiorari	8
II. The decision below was clearly correct	8
CONCLUSION	11
AFFIDAVIT OF SERVICE	12

TABLE OF AUTHORITIES

CASES CITED

	Page
Browder v. *Director, Department of Corrections*, 434 U.S. 257 (1978)	9
Daily Mirror Inc. v. *New York News, Inc.*, 533 F.2d 53 (2d Cir.), *cert. denied*, 429 U.S. 862 (1976)	9
Eutectic Corp. v. *Metco, Inc.* 597 F.2d 32 (2d Cir. 1979)	9
Hoffman v. *Celebrezze*, 405 F.2d 833 (8th Cir. 1969)	9
Sampson v. *Radio Corp. of America*, 434 F.2d 315 (2d Cir. 1970)	9
Schildhaus v. *Moe*, 335 F.2d 529 (2d Cir. 1964)	9
Seese v. *Volkswagenwerk, A.G.*, 679 F.2d 336 (3d Cir. 1982)	9
United States v. *Johnston*, 268 U.S. 220 (1925)	8

RULES CITED

Federal Rules of Civil Procedure, Rule 60(b)	2, 6, 7, 8, 9
Federal Rules of Civil Procedure, Rule 41(b)	2, 5
Rules of Civil Procedure of the United States District Court for the District of Connecticut, Rule 16	2, 4, 5, 10
Supreme Court Rule 28.3	12

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GERALDINE FENNELL,
on behalf of herself and all others similarly situated,
Petitioner,

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WARNER-LAMBERT COMPANY,
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On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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BRIEF FOR RESPONDENT IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

This brief is submitted on behalf of respondent Warner-Lambert Company ("Warner-Lambert") in opposition to the petition for a writ of certiorari.

RULES INVOLVED

Rule 60(b)(1), Federal Rules of Civil Procedure, provides in relevant part:

> Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, etc.
>
> On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect;

Also involved are:

Rule 41(b), Federal Rules of Civil Procedure, which provides in relevant part:

> Involuntary Dismissal: Effect Thereof. For failure of the plaintiff to prosecute or to comply with these rules or any order of the court, a defendant may move for dismissal of an action or of any claim against him. . . . Unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction, for improper venue, or for failure to join a party under Rule 19, operates as an adjudication upon the merits.

Rule 16, Local Rules of Civil Procedure for the United States District Court for the District of Connecticut, in the form in which it existed at all times relevant to this case, provides:*

> Dismissal of Actions by the Clerk
>
> (a) For failure to prosecute.
>
> In civil actions in which no action has been taken by the parties for one year, the clerk shall give notice of proposed dismissal to counsel of record. If such notice has been given and no action has been taken in any civil action in the meantime and no satisfactory explanation is submitted to the court within thirty days thereafter, the clerk shall enter an order of dismissal. Any such order entered by the clerk under this rule may be suspended, altered, or rescinded by the court for cause shown.

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* Rule 16(a) was amended effective January 1, 1984.

STATEMENT OF THE CASE

On June 17, 1977, Geraldine Fennell ("Fennell") commenced this action, charging that she was discharged in 1974 because of sex discrimination and in reprisal for events which are alleged to have occurred in 1971. (A6-A15)* Although she now appears *pro se*, Fennell was represented by counsel throughout the litigation until the case was dismissed in May 1983 for lack of prosecution.

At the time Warner-Lambert filed its motion to dismiss, the case was five and one-half years old. Yet, except for production in 1977 and 1979 of a small number of documents, there had been no discovery in the case whatsoever.

In 1978, counsel for the parties developed and agreed upon a discovery program which, however, was for the most part held in abeyance because of the pendency of Fennell's motion for partial summary judgment in respect of defenses based upon her failure to timely file her charge of discrimination and her failure to file any charge of retaliation with the EEOC as required by law. (A111-A118)

On January 3, 1980, the District Court denied the summary judgment motion and the road was then clear to resume discovery. (A69-A79) During the next three years, however, Fennell failed to proceed with discovery as previously agreed upon and, instead, appears to have focused her attention on a dispute with her attorney, whom she refused to allow either to withdraw from, or resume work on, the case.

In May 1979, several weeks after the argument of Fennell's summary judgment motion, her counsel told Fennell that he wished to withdraw as her attorney and that she should seek other counsel. Then, on December 14, 1979, her counsel filed a motion requesting leave to withdraw. (A66-A67) On

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*References to "A " are to the Appendix submitted by the Defendant-Appellee to the Second Circuit dated November 25, 1985.

June 20, 1980, while that motion was still technically pending, Fennell's counsel filed a second motion for leave to withdraw as counsel. (A80) Fennell, however, adamantly refused to agree to her counsel's withdrawal and the District Court denied the application. (A66, A80)

Having thus persuaded the District Court to deny counsel's motion to withdraw, Fennell nevertheless refused to let him proceed with the case. As Fennell herself stated in 1983 in her principal brief to the Second Circuit seeking reversal of the judgment of dismissal:

> Freely, to have gone along with Mr. Cochran's withdrawal as counsel on the grounds that I distrusted him or, following Judge Burn's denial of his (first) motion to withdraw, to have allowed him to resume work on my case as though the whole episode had not happened and in the light of his subsequent response to my questions, or to have released him, left too many questions unanswered. I felt that my actions from then one [sic] under any of the three options, would not be the informed actions of a responsible person. (A282-A283)

It is thus clear that the failure to proceed with discovery subsequent to the November 1980 denial of counsel's motion to withdraw stemmed directly from Fennell's refusal to allow her counsel to resume work on the case.

On April 29, 1981, the Clerk of the District Court issued a notice under Local Rule 16 of proposed dismissal for Fennell's failure to prosecute. (A94)

Thereafter, in response to a letter from Fennell's counsel, the Clerk extended until September 22, 1981 the date by which Fennell was required to take some action in the case or furnish a satisfactory explanation as to why the action should not be dismissed. (A96) The September 22, 1981 date arrived, but no action to prosecute the case had been taken and no explanation had been given as to why the action should not be dismissed.

On December 22, 1981, counsel for Warner-Lambert wrote a letter to the Court requesting that the action be dismissed for Fennell's failure to comply with Local Rule 16. (A103-A104) On January 4, 1982, Fennell personally wrote a letter to the Clerk of the District Court opposing Warner-Lambert's request that the case be dismissed. (A105) Nevertheless, during the next year, Fennell did not take a single step to proceed with outstanding discovery matters.

The Court held a status conference on December 14, 1982. At that time, this case was almost five and a half years old. It related to events some of which had occurred more than a decade earlier. A key witness having knowledge of the circumstances surrounding Fennell's 1974 termination had died. A number of other witnesses had left Warner-Lambert. The passage of time and the involvement of these witnesses in other activities had undoubtedly diminished their recollections as to the events in issue. (A108-A110) As the District Court noted in its 1985 ruling denying the motion for relief from judgment:

> Although not, perhaps, explicit enough for plaintiff, the court did find defendant's claims of prejudice by delay credible and a factor weighing in favor of dismissal. Surely plaintiff must recognize that if the court found defendant had been prejudiced by delay in May of 1983, the situation was even more difficult in May of 1984, when plaintiff filed this motion, and the obstacle was that much harder for plaintiff to overcome as of that date. (Plaintiff was discharged by defendant over a decade ago.) (Pet., D-12)*

On December 29, 1982, Warner-Lambert moved to dismiss the action pursuant to Rule 41(b), Federal Rules of Civil Procedure, and Rule 16(a), the Rules of Civil Procedure of the United States District Court for the District of Connecticut, for Fennell's failure to prosecute. (A106-A107) After a

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* References to "Pet., " are to the Appendix of Fennell's Petition for Writ of Certiorari.

hearing on March 7, 1983, the District Court, on May 2, 1983, granted the motion to dismiss. (A144-A154, Pet. F1-F15)

On June 6, 1983, Fennell filed *pro se* a notice of appeal. (A155)

The Order of Dismissal was unanimously affirmed by the Second Circuit on November 25, 1983. (Pet., E1-E3) Two motions for rehearing were thereafter denied by that Court.

On October 1, 1984, this Court denied Fennell's petition for a writ of certiorari. An application for an extension of time to file a petition for rehearing was granted to November 14, 1984. A second application for an extension of time was thereafter denied.

In the normal course, this should have brought an end to the litigation. However, on May 4, 1984, just short of a year after the original judgment of dismissal had been entered, and after the Court of Appeals for the Second Circuit had entered its order affirming the dismissal and denying the first of the two petitions for rehearing, Fennell filed a motion under Rule 60(b)(1) for relief from judgment on the grounds that there had been "mistakes of substance . . . ." (A162-A163) This motion, which sought to yet again argue the matters previously decided, was denied on March 5, 1985. (A185-A194, Pet. D1-D14)

In said motion, Fennell focused on certain aspects of the District Court's May 1983 opinion. The "main mistake" ascribed to the District Court was its alleged failure to take into account an October 1977 response by Fennell to Warner-Lambert's request for production of documents. There was, however, not the slightest suggestion in the District Court's original opinion that it had been unaware of or failed to take into account Fennell's October 1977 response to Warner-Lambert's document request, and in its opinion denying relief from judgment, the District Court states that it "was and is aware" of the 1977 response. (Pet. D-3) The second alleged

"mistake" consisted of a reference in the original 1983 District Court opinion to a letter dated January 22, 1979 by counsel for Warner-Lambert, enumerating "specific documents" that it was requesting. The Court's alleged error consisted of its reference to "specific documents" when the letter referred to specific *categories* of documents. This nitpicking distinction, too, was dealt with by the District Court which concluded "there can be no serious dispute that plaintiff's counsel was fairly apprised of what documents defendant wanted from plaintiff." (Pet. D-4) Finally, a claim by Fennell that there was no stipulation "in the record" regarding document production ignored the fact, specifically found by the District Court in denying the Rule 60 motion, "that the correspondence between counsel does evidence just such an agreement." (Pet. D-5)

Each and every one of these three grounds of "mistake", moreover, could have been argued to the court by Fennell on the original appeal and was in fact so argued. (A266-267, 285-286, 288, 344-345, 357, 359, 362, 364)

Subsequent motions for reconsideration, for an evidentiary hearing, and for clarification and reconsideration were denied on various dates in 1985. (A225-A226, A227-A245)

On January 17, 1986, the Court of Appeals for the Second Circuit affirmed the District Court's denials of the motions for relief from judgment. (Pet., A1-A4) The Second Circuit stated that:

> The basis for Fennell's Rule 60(b)(1) motion and her subsequent motions for reconsideration and clarification are her claims that the district court never realized that Fennell responded in 1977 to Warner's discovery requests, and that the court incorrectly found that the parties entered a stipulation regarding the discovery. The district court's opinion denying appellant's Rule 60(b)(1) motion responded to both these claims. The court stated it knew of Fennell's 1977 response, but

that a single response was insufficient considering Fennell's intractable status in the three years following in which the case was pending. As to the stipulation, the court stated that while no official written stipulation existed, correspondence between the parties evidenced an understanding regarding discovery.

Both of these findings are supported by the record.

On February 24, 1986, the Second Circuit denied Fennell's motion for extension of time in which to file a petition for rehearing. (Pet., B) Thereafter, Fennell filed a "Motion For Review of Action of One Judge," seeking to have the Court of Appeals review the denial of an extension of time to file the Petition for Rehearing. This motion was denied on May 7, 1986. (Pet., B)

ARGUMENT

I. No Reason Exists for Granting the Writ of Certiorari

As is obvious from the Petition itself, despite this Court's prior denial of certiorari in 1984, Fennell seeks to have this Court review, still again, the facts found by the District Court, reviewed by the Court of Appeals in 1983, reconsidered by the District Court on the Rule 60(b)(1) motion in 1985, and reviewed yet again by the Court of Appeals in 1986. This Court, however, does "not grant certiorari to review evidence and discuss specific facts." *United States* v. *Johnston*, 268 U.S. 220, 227 (1925).

None of the considerations which would justify the grant of certiorari were present when this Court denied certiorari in 1984 and none are present here.

II. The Decision Below Was Clearly Correct

On May 4, 1984, Fennell filed a motion for relief from judgment under Rule 60(b)(1) alleging "mistakes of substance . . ." in the District Court's original 1983 ruling. This motion was denied by the District Court on March 5, 1985.

It is clear that a Rule (60)(b) motion is not a substitute for appeal. *Eutectic Corp.* v. *Metco, Inc.*, 597 F.2d 32, 34 (2d Cir. 1979). As this Court has made clear in *Browder* v. *Director, Department of Corrections*, 434 U.S. 257, 263, n.7 (1978), the underlying judgment is not brought up for review by an appeal from a denial of a Rule 60(b) motion:

> A timely appeal may be taken under Fed. Rule App. Proc. 4(a) from a ruling on a Rule 60(b) motion. The Court of Appeals may review the ruling only for abuse of discretion, however, and *an appeal from denial of Rule 60(b) relief does not bring up the underlying judgment for review. See Daily Mirror Inc.* v. *New York News, Inc.*, 533 F.2d 53 (CA2), *cert. denied*, 429 U.S. 862 (1976); *Brennan* v. *Midwestern Life Ins. Co.*, 450 F.2d 999 (CA7 1971), *cert. denied*, 405 U.S. 921 (1972); 7 J. Moore, Federal Practice § 60.19, p. 231; § 60.30[3], pp. 430-31 (1975) (emphasis added).

Consequently, the key issue before the Second Circuit was whether the District Court had committed an abuse of discretion in denying the motion for relief from judgment. *See, e.g., Daily Mirror, Inc.* v. *New York News, Inc.*, 533 F.2d 53 (2d Cir. 1976), *cert. denied*, 429 U.S. 862 (1976); *Sampson* v. *Radio Corp. of America*, 434 F.2d 315, 317 (2d Cir. 1970).*

There was no abuse of discretion in denying plaintiff's motion under Rule 60(b)(1). Indeed, it would have constituted an abuse of discretion if the motion had been granted. Fennell's presentation to the District Court on the Rule 60(b)(1) motion related wholly to events which occurred prior

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* Two other issues related to the District Court's jurisdiction to grant such a motion. These issues were not reached by the Court of Appeals. Respondent contends that the Rule 60(b) motion was not timely because it was not made within a "reasonable" time as provided in Rule 60. In the context of a claim of judicial mistake, courts have required such a claim to be made within the thirty-day appeal period. *See Schildhaus* v. *Moe*, 335 F.2d 529, 531 (2d Cir. 1964); *Hoffman* v. *Celebrezze*, 405 F.2d 833, 836 (8th Cir. 1969). Respondent further contends that the District Court lacked jurisdiction to reverse itself because the motion was based on matters included or includable in the prior appeal. *Seese* v. *Volkswagenwerk, A.G.*, 679 F.2d 336, 337 (3d Cir. 1982).

to the date of judgment. All of her claims and arguments could have been presented in the course of the proceedings on the original 1983 motion to dismiss for failure to prosecute and were in fact so presented.

Fennell admits that she would not permit her counsel to proceed with the case, but would not allow him to withdraw. She not only failed to prosecute her case generally, but also failed to comply with a notice under Local Rule 16. In such circumstances, the dismissal of the action by the district Court was not an abuse of discretion; and it certainly was not an abuse of discretion to deny the motion for relief from judgment after affirmance of the 1983 dismissal by the Court of Appeals.

CONCLUSION

Petitioner Fennell is apparently of the view that it is appropriate to relitigate this case indefinitely. All litigation, however, must some day come to an end. The time to end this litigation has long since come.

For each of the reasons assigned, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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